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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 852

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased,

Petitioner,

vs.

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

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vs.

NORTHWEST AIRLINES, INC., a Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Petitioner, Irene Cox, Administratrix of the Estate of Randall S. Cox, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in this cause.

OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit appears as an appendix to this Petition and is reported at 379 F. 2d 893. Petitioner's Petition for Rehearing en banc was denied, with three judges of the Court of Appeals voting in favor of the Petition.

JURISDICTIONAL STATEMENT.

Judgment in the Circuit Court of Appeals was entered on May 16, 1967, and the judgment became final on August 28, 1967, when Petitioner's Petition for Rehearing was denied.

The jurisdiction of this Court has several foundations:

(a) It is invoked under sections 1254(1) and 2101(c), Title 28, United States Code, providing for review by this Court by writ of certiorari. The federal rights claimed and involved and the questions presented herein arise under the Death on the High Seas Act. (46 U.S.C.A., sec. 761, et seq.) The question of measure of damages under this Act is in issue; it is the same as in a death action under the Federal Employers' Liability Act. (45 U.S.C.A., sec. 51, et seq.)

(b) This opinion is in direct conflict in principle with other Courts of Appeals on the same subject matter, namely, the measure of damages, which is part of the remedy afforded by the Act. Every other Court of Appeals which has considered this question under this specific statute has not only decided it directly contrary to the

opinion of the Seventh Circuit, but in each instance has reversed any district court who made deductions for possible Federal Income Taxes in computing the measure of damages in an action under the Death on the High Seas Act. Supreme Court Rule 19(1), effective October 2, 1967.

The Second, Third and Fifth Circuits have specifically held that income tax computations must be excluded in computing damages in an action under the Death on the High Seas Act. (*Petition of Marina Mercante Nicaraguense, S. A.*, 2 Cir., 364 F. 2d 118; *Noel* v. *United Aircraft Corporation*, 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400; *United States* v. *Puscedu*, 5 Cir., 224 F. 2d 5.)

The measure of damages in a Death on the High Seas action is the same as that in a death action under the Federal Employers' Liability Act. (*VanBeeck* v. *Sabine Towing Co.*, 300 U.S. 342.) This, of course, would likewise apply to the Jones Act.

The First, Second and Sixth Circuits have excluded the element of Federal Income taxation in computing damages in death actions under the Federal Employers' Liability Act. (*Boston and Maine Railroad* v. *Talbert*, 1 Cir., 360 F. 2d 286; *McWeeney* v. *New York, N. H. & H. R. R. Co.*, 2 Cir., 282 F. 2d 34; *Payne* v. *Baltimore & O. R. Co.*, 6 Cir., 309 F. 2d 546.)

Another reason why this Court should take jurisdiction is that there is a direct conflict in principle between this decision and that of the highest State Court of Illinois, which has held that in a death action under the Federal Employers' Liability Act, the question of possible tax liability is not to be considered. (*Allendorf* v. *E. J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288.)

THE QUESTIONS PRESENTED.

1. In an action under the Death on the High Seas Act, can a Court of Appeals properly order a district court to compute damages on the basis of "net income" or "net earnings," making deductions for deceased's possible federal income taxation, notwithstanding that the Act of Congress provides for "fair and just compensation for the pecuniary loss sustained" and notwithstanding that, without exception, other Courts of Appeals of other Circuits have held the measure of damages must be computed without reference to deductions for possible federal income tax liabilities of the decedent? Embraced in this question is: What is the measure of damages in a death action under the Death on the High Seas Act, the Federal Employers' Liability Act, or the Jones Act? Is it "net earnings" or "net income" rather than pecuniary loss?

2. Prior to this decision on each occasion, without exception, that a district court had undertaken to compute the element of federal income taxation, such has been held error by the various Courts of Appeals. Moreover, all other Courts of Appeals to whom the question has been presented in death actions under the Federal Employers' Liability Act, wherein the measure of damages is the same, have uniformly excluded a computation of the deceased's federal income tax liability in awarding damages.(*)

(*) If certiorari is granted, Petitioner would reserve the question whether, in calculating the loss of inheritance, an element of $30,000, the Court of Appeals can properly state that the record does not support an assumption of reduction to present value, (Opinion p. 5a) when the findings of fact of the district court indicate such reduction, as well as assessing costs when such is contra to *Friedman* v. *McHugh*, 1 Cir., 168 F. 2d 350.

CONCISE STATEMENT OF THE CASE.

Petitioner's decedent, a 29 year old Army Captain, lost his life on June 3, 1963, when Respondent's plane, enroute from Seattle, Washington, to Elmendorf Air Force Base, Alaska, crashed into the Pacific Ocean. There was no explanation of the cause.

He left surviving a wife younger than himself and two children, Brian born August 10, 1959, and Alyssa born June 13, 1962. In computing damages, the District Court, the Honorable Michael L. Igoe, made no deduction for income tax decedent would possibly pay on earnings.

The Court of Appeals held that for the twenty year period, commencing with 1979, when his earnings would have been $15,655 to $20,608 per annum had the compensation remained the same, there should be a deduction for income tax, and that the measure of damages was the "net income."(*) (Opin. p. 5a)

(*) Thus, some of the sums which the Court held should be computed on a taxable basis are by law tax free. We refer to the military pay and allowances. (26 C.F.R., sec. 1.61-2(b).) If the present rates or payments and allowances are maintained, this would be $217.98 per month, or $2,615.76 per year. From 1979 until retirement in 1986, there is a period of eight years at $2,615.76 per annum, totaling $20,926.08.

Thus, Petitioner's decedent would not be making $15,655 per year in 1979, but had the present rates of compensation and subsistence failed to escalate, as has been the annual history, his taxable earnings would have been $13,039.24, not $15,655.

REASONS FOR GRANTING THE WRIT.

The measure of damages in an action under the Death on the High Seas Act is "* * * fair and just compensation for the pecuniary loss sustained * * *" This provision has specifically been held not to mean "net earnings" or "net income" as the Seventh Circuit has held.

As recently as 1965, in *Noel v. United Aircraft Corporation,* 3 Cir., 342 F. 2d 232, in an action under the Death on the High Seas Act, a judgment in the sum of $387,387 for the death of a man who earned $418,000 during the five years preceding his death (see p. 238, footnote 5) was reversed on the issue of damages, with the Court of Appeals holding the District Court erred in making the computation. Amongst other errors was the basis of decedent's "net income." Here is what it had to say at p. 240:

> "The trial court in its fact-findings spoke of 'net income' and 'net earnings.' The Death on the High Seas Act allows as damages 'fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought * * *.' 'Pecuniary loss' is the 'reasonable expectation of pecuniary benefits which would have flowed from the continued life of the deceased.' *The S. S. Black Gull,* 90 F. 2d 619 (2d Cir. 1937), cert. den. *Faye* v. *American Diamond Lines,* 302 U.S. 728, 58 S. Ct. 50, 82 L. Ed. 562. 'Pecuniary loss' is not measured in terms of, nor restricted to, 'net income' or 'net earnings.'"

Certainly this 1965 decision of the Third Circuit needs no further elucidation. The Act provides for "pecuniary loss." It does not say "net loss" nor "net earnings."

The measure of damages under this Act is exactly the same as in a death action under the Federal Employers' Liability Act and, of course, the Jones Act. (See: *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 346; *Middleton* v. *Luckenbach Co.*, 2 Cir., 70 F. 2d 326, 330, cert. den. 293 U.S. 577; *National Airlines, Inc.* v. *Stiles*, 5 Cir., 268 F. 2d 400, 404.)

The Death on the High Seas Act is no less a creature of Congress than the Federal Employers' Liability Act or the Jones Act. Each provides the same measure of damages for death. The mandate of this Court is for uniform administration; this Act is not to be administered in a patchwork fashion. (*Southern Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367.)

But there is more. The remedy has been declared to be part and parcel of the Federal Employers' Liability Act. This Act, being a creature of Congress and having the identical remedy, namely, pecuniary loss, must be interpreted so as not to in anywise dilute the remedy afforded by the Act itself.

If the remedy in one court is net earnings with an allowance for income tax payments, while in another court income tax is not considered, there is obviously a gross disparity, not only in the administration of the Act but in the very remedy itself.

Congress, by the specific provisions of the Internal Revenue Code, excludes from gross income the amount of any damages received. (26 U.S.C.A., sec. 104 (a)(2).) If Congress intended to allow the tortfeasor to use an income tax deduction, it must be presumed it would have said so, since this question first arose in 1944, twenty-three years ago. (*Stokes* v. *United States*, 2 Cir., 144 F. 2d 82.)

PRIOR TO THIS OPINION, ON EACH OCCASION A DISTRICT COURT HAS CONSIDERED THE ELEMENT OF FEDERAL TAXATION IN AN ACTION UNDER THIS STATUTE, ON APPEAL THIS HAS BEEN HELD ERROR; THERE IS NO PRECEDENT FOR THE PRESENT OPINION.

In *Noel* v. *United Aircraft Corporation,* 3 Cir., 342 F. 2d 232, a judgment in a much larger sum was reversed for this specific reason. So also in *Petition of Marina Mercante Nicaraguense, S. A.,* 364 F. 2d 118, the deduction was held error.

That the element of income tax has no part in an action under this statute was first adjudicated in 1944 in *Stokes* v. *United States,* (2 C.A.) 144 F. 2d 82, whose virility is demonstrated by *Cunningham* v. *Rederiet Vindeggen A. S.,* 2 Cir., 333 F. 2d 308. See also: *National Airlines, Inc.* v. *Stiles,* 5 Cir., 268 F. 2d 400, cert. den. 361 U.S. 855, and *United States* v. *Puscedu,* 5 Cir., 224 F. 2d 5, where the findings of the Court are footnoted at page 6 of the opinion. These courts refused to consider the income tax element in computing damages.

In the opinion, the Court has cited two authorities. We respectfully submit that neither can support the position of the Court.

O'Connor v. *United States,* 2 Cir., 269 F. 2d 578, an action under Federal Tort Claims Act, was purportedly decided under the law of Oklahoma. Its inapplicability to an action under this statute was pointed out by the same Court which decided *McWeeney* v. *New York, N. H. & H. R. R. Co.,* 2 Cir., 1960, 282 F. 2d 34, 39.

The Oklahoma Supreme Court has itself specifically considered and repudiated the *O'Connor* case in a Fed-

eral Employers' Liability Act case. (See: *Chicago, R. I. & P. R. Co.* v. *Kinsey,* (Okla., 1962) 372 P. 2d 863, 867, 868.)

Petition of Marina Mercante Nicaraguense, S. A., 364 F. 2d 118, the only other opinion referred to by the Court of Appeals below, was a situation where the judgment of the District Court was held erroneous because the District Court deducted income tax in computing damages in the death of tugboat workers, one of whom earned $11,500.

True, there was some comment in the *Nicaraguense* case about "the opposite end of the spectrum." That such was pure dictum is demonstrated by the fact that no Court, even in the case of large earners in actions under this statute, has employed it. (See: *Noel* v. *National Aircraft Corporation,* 3 Cir., 359 F. 2d 671; *National Airlines, Inc.* v. *Stiles,* 5 Cir., 268 F. 2d 400; *O'Toole* v. *United States,* 3 Cir., 242 F. 2d 308, 311. In these cases the earnings per annum ran from $35,000 to $250,000.)

THE IMPACT OF THIS DECISION UPON THE ADMINISTRATION OF THIS STATUTE AND SIMILAR FEDERAL STATUTES.

This Court has stated that the measure of damages is the same under the Death on the High Seas Act as in an action for wrongful death under the Federal Employers' Liability Act. This would naturally be true in Jones Act cases.

Thus, this case presents more than an interpretation of the Death on the High Seas Act, but rather points up the propriety of income tax deduction in the case of two other Federal statutes employed daily in the courts of this country, namely, the Federal Employers' Liability Act (45 U.S.C.A., sec. 51, et seq.) and the Jones Act (46 U.S.C.A., sec. 688).

Although there may be a jury trial in those actions, nonetheless, it has been specifically held that the problem is no different when it arises before a judge sitting without a jury than before a judge and a jury. (*McWeeney* v. *New York, N. H. & H. R. R. Co.*, 2 Cir., 282 F. 2d 34, cert. den. 364 U.S. 870; *Petition of Marina Mercante Nicaraguense, S. A.*, 2 Cir., 364 F. 2d 118.)

Within the very State of Illinois, there will be a variance in the remedies under the Federal Employers' Liability Act, depending upon whether the case is in a State of Federal court. Actions under the Federal Employers' Liability Act and under the Jones Act will exclude the element of income tax, if brought in the State Court of Illinois, under the decisions of its highest court of review in *Hall* v. *Chicago & N. W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77, and *Allendorf* v. *E. J. & E. Ry. Co.*, 8 Ill. 2d 164, 133 N.E. 2d 288, a death action under the Federal Employers' Liability Act. But actions under all these Federal statutes in the district courts of the Seventh Circuit will, under this decision, include the possibility of the potential tax liability of the decedent.

Certainly, nothing is farther from the uniform administration of Federal statutes sought by Congress and dictated by this Court than for one court to afford a different remedy under the same Federal statute than that allowed by another court only three blocks away.

CONCLUSION.

Where, as here, the Court of Appeals has, in considering damages under this Federal statute, departed from the the Act of Congress, as well as the decision of every other Circuit which has considered this specific question, certiorari should be granted to resolve this conflict. But there is more. Since the measure of damages under this Act has been held by this Court to be the same as that in a death action under the Federal Employers' Liability Act, this decision constitutes a departure from cases of other Circuits deciding this specific question. Moreover, it will be sought to be employed in the day in and day out practice of death actions under the Federal Employers' Liability Act in courts throughout the country, unless certiorari is granted here.

We respectfully submit that in the interests of the orderly administration of these Federal Acts, as well as of simple justice, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorney for Petitioner.